

EFTA COURT

Request for an Advisory Opinion from the EFTA Court by Frostating lagmannsrett dated 24 October 2016 in the case of Fosen-Linjen AS v AtB AS

(Case E-16/16)

A request has been made to the EFTA Court by a letter dated 24 October 2016 from Frostating lagmannsrett (Frostating Court of Appeal), which was received at the Court Registry on 31 October 2016, for an Advisory Opinion in the case of Fosen-Linjen AS v AtB AS on the following questions:

- 1. Do Article 1(1) and Article 2(1)(c) of Directive 89/665/EEC, or other provisions of that Directive, preclude national rules on awarding damages, where the award of damages due to the contracting authority having set aside EEA law provisions concerning public contracts, is conditional on
 - a) the existence of culpability and a requirement that the contracting authority's conduct must deviate markedly from a justifiable course of action?
 - b) the existence of a material error where culpability on the part of the contracting authority is part of a more comprehensive overall assessment?
 - c) the contracting authority having committed a material, gross and obvious error?**
- 2. Should Article 1(1) and Article 2(1)(c) of Directive 89/665/EEC, or other provisions of that Directive, be interpreted to mean that a breach of an EEA procurement law provision under which the contracting authority is not free to exercise discretion, constitutes in itself a sufficiently qualified breach that may trigger a right to damages on certain conditions?**
- 3. Do Article 1(1) and Article 2(1)(c) of Directive 89/665/EEC, or other provisions of that Directive, preclude national rules on awarding damages, where the award of damages due to the contracting authority having set aside EEA law provisions concerning public contracts is conditional on the supplier that brings the case and claims compensation proving with a clear, that is qualified preponderance of evidence, that [said supplier] should have been awarded the contract had the contracting authority not committed the error?**
- 4. Do Article 1(1) and Article 2(1)(c) of Directive 89/665/EEC, or other provisions of that Directive, preclude national rules whereby the contracting authority can free itself of the claim for damages by**

invoking that the tender procedure should in any case have been cancelled as a consequence of an error committed by the contracting authority, other than the error invoked by the plaintiff, when that error was not in fact invoked during the tender procedure? If such other error can be invoked by the contracting authority, does Directive 89/665/EEC preclude a national rule whereby the supplier that brings the action has the burden of proof for the non-existence of such an error?

- 5. What requirements does the EEA law principle of equal treatment place on the contracting authority's effective verification of the information provided in the tenders linked to the award criteria? Will the requirement for effective verification be met if the contracting authority is able to verify that the properties offered in the tender appear to have been reliably determined on the basis of the documentation provided in the tender? How accurately must the contracting authority be able to verify the properties of the contract object offered in the tender? If the tenderer commits himself to a certain consumption figure for the tendered object, and this figure is incorporated in the tender evaluation, is the contracting authority's verification obligation met if he is able to verify that this figure is reliable with a certain uncertainty margin, for example in the order of plus/minus 20 per cent?**

When the contracting authority is to verify the information provided by a tenderer in connection with an award criterion, can the requirement for effective verification of the tenders under the principle of equal treatment be met by the contracting authority having regard to documentation provided elsewhere in the tender?